

IN THE  
COURT OF CRIMINAL APPEALS OF TEXAS

**VICTOR ORTIZ GONZALEZ,**  
***APPELLANT***

**v.**

**THE STATE OF TEXAS,**  
***APPELLEE***

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**NO. PD-0572-19**

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§ § §  
**STATE'S BRIEF ON THE MERITS OF**  
**STATE'S PETITION FOR DISCRETIONARY REVIEW**  
§ § §

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## STATEMENT OF THE CASE

This case addresses whether the inclusion of an unalleged reckless culpable mental state in an application paragraph charging aggravated assault against a public servant can cause egregious harm when that same culpable mental state could have been properly alleged as a lesser offense with no actual effect on the jury's ability to convict a defendant or on the defendant's potential punishment range.

## STATEMENT OF PROCEDURAL HISTORY

The appellant was indicted for aggravated assault against a public servant alleging intentional and knowing culpable mental states. (C.R.I:5). The trial court's jury charge included the reckless culpable mental state in its abstract and application paragraphs. (C.R. I:52, 55). The appellant did not object to this inclusion of the reckless culpable mental state. (R.R. V:4). The jury convicted the appellant of aggravated assault against a public servant, found the repeat offender allegation to be true, and sentenced him to forty-five years' confinement and a \$10,000 fine. (C.R. I:61, 71, R.R. V:25, VII:4-5).<sup>1</sup>

On May 9, 2019, the court of appeals held that the appellant suffered egregious harm due to a lowering of the State's burden of proof because the jury was

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<sup>1</sup> The jury also convicted the appellant of evading arrest or detention with a vehicle. (C.R. I:62; R.R. V:25). That conviction is not affected by the issue presented on discretionary review.

charged on an un-indicted reckless culpable mental state and the State argued that recklessness was sufficient to convict him. See [\*Gonzalez v. State\*, 2019 WL 2042573, at \\*6 \(Tex. App. – Fort Worth May 9, 2019\)](#) (not designated for publication).<sup>2</sup>

On August 21, 2019, this Court granted the State’s petition for discretionary review to determine whether a jury charge applying an unalleged reckless culpable mental state for aggravated assault in a unitary application instruction can cause egregious harm when applying that same reckless culpable mental state as a lesser-included offense would not even be error. See Order Granting State’s Petition for Discretionary Review.<sup>3</sup>

### ISSUE PRESENTED

Whether the court of appeals properly determined that the appellant suffered egregious harm by the inclusion of an unalleged reckless culpable mental state for aggravated assault in a unitary application instruction when applying that same reckless culpable mental state as a lesser-included offense would not even be error and where there is no question that the appellant received fair notice of the alleged reckless conduct?

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2 The court of appeals also found that the evidence was sufficient to support the jury’s verdict that the appellant committed aggravated assault against a public servant under both the intentional and knowing culpable mental states; declined to address a repetitive fine challenge since it was reversing his aggravated assault conviction; and affirmed his conviction for evading arrest or detention. [\*Gonzalez v. State\*, 2019 WL 2042573, at \\*1, 6.](#)

3 The State set out two other questions for review in its petition which the Court declined to grant. See Order Granting Petition for Discretionary Review.

## STATEMENT OF FACTS

On April 24, 2017, Officers Craig Chambers and Taylor Rogers (in one patrol car) and Officer Kendall Harris (in a second patrol car) began searching for the car driven by someone who had stolen tracked-property from a bait car. (R.R. III:19-21, 67, IV:8). Officers Chambers and Rogers observed a yellow Hummer which they believed contained the stolen property. (R.R. III:21). After observing the Hummer roll through a stop sign, the officers decided to initiate a traffic stop and Officer Chambers activated his overhead lights. (R.R. III:22-23, 67-68, IV:9). The Hummer driver responded by accelerating into a nearby gated apartment complex. (R.R. III:23, 68).

Despite the danger of parked cars and pedestrians, the Hummer driver sped through the parking lot until he reached a locked gate at the complex's end. (R.R. III:24-25, 69-70, IV:11). Officer Chambers positioned his patrol car on the Hummer's left side to block it and to keep the driver from fleeing. (R.R. III:26, 70-71, IV:11). Officer Harris, who had joined the pursuit, positioned his patrol car on the Hummer's right side. (R.R. IV:10-11).

Officer Rogers opened his door and began getting out to initiate a felony stop for evading arrest. (R.R. III:27, 71-72, IV:13). At this same point, the driver placed the Hummer into reverse hitting Officer Rogers and pinning him against his patrol car. (R.R. III:28-29, 72, IV:14). Officer Harris narrowly avoided injury



because he had just opened his door. (R.R. IV:14). The driver accelerated forward before reversing a second time to push through the patrol cars. (R.R. III:30-31). He damaged both patrol cars in the process. (R.R. III:30, 72, IV:14).

The driver sped off the parking lot into a common area designed for pedestrians. (R.R. III:32, 75, IV:15). Officers Chambers and Rogers pursued on foot commanding the driver to stop. (R.R. III:32, 74). They ended their foot pursuit when Officer Rogers began feeling severe pain in his right leg, right elbow and chest from being hit by the Hummer. (R.R. III:33, 76). He was later transported to the hospital for medical treatment. (R.R. III:34). Meanwhile, Officer Harris circled back around the complex where he saw the driver crash his Hummer into a structure and run away. (R.R. III:15). Officer Chambers testified that the Hummer was driven in a manner capable of causing serious bodily injury or death. (R.R. III:73, 76).

Fingerprints from the Hummer's driver-side door and the rear cargo window matched the appellant's known fingerprints. (R.R. IV:33-35, 65). Officer Rogers identified the appellant as the driver in a photographic lineup. (R.R. IV:80-81). The appellant admitted driving the Hummer and knowing exactly where the police were situated before he put his Hummer in reverse. (R.R. IV: 88).

## SUMMARY OF THE ARGUMENT

The trial court's inclusion of an unalleged reckless culpable mental state in its application paragraph did not cause the appellant egregious harm or deprive him of a fair trial because the trial court could have properly instructed the jury on that same reckless culpable mental state as a lesser-included, albeit conceptually-equivalent, offense without any change to the appellant's trial or punishment consequences.

## ARGUMENT

### **A. Standard of Review**

The standard for reviewing jury charge errors depends on whether a defendant timely objected to the jury instructions. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Unobjected-to jury charge error will not result in a reversal unless it is so egregious and created such harm that the defendant did not have a fair and impartial trial. *Marshall v. State*, 479 S.W.3d at 843; *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d at 171. Egregious harm is a “high and difficult standard” to meet, and such a determination must be borne out by the trial record. *Villareal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). A defendant must suffer “actual harm” rather than “theoretical harm”; and the error must have affected the very basis of the case, deprived the defendant of a valuable

right, or vitally affected a defensive theory. *Marshall v. State*, 479 S.W.3d at 843; *Villareal v. State*, 453 S.W.3d at 433; *Nava v. State*, 415 S.W.3d at 298; *Almanza v. State*, 686 S.W.2d at 171.

Traditionally, when determining whether charge error caused egregious harm, the reviewing courts have examined (1) the entirety of the jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the arguments of counsel, and (4) any other relevant information revealed by the trial record's entirety. *Villareal v. State*, 453 S.W.3d at 433. However, as this Court has recently noted, where a record reveals a risk of harm that is so small that it may properly be characterized as not "remotely significant," or where the risk of harm is "almost infinitesimal", any harm resulting from the error is only theoretical harm. *French v. State*, 563 S.W.3d 228, 239 (Tex. Crim. App. 2018).

#### **B. Only Theoretical Harm Where Error Had No Practical Consequences**

A person commits aggravated assault if he intentionally, knowingly or recklessly causes bodily injury to another, and he uses or exhibits a deadly weapon during the assault's commission. **Tex. Penal Code §22.02(a)(2)**. A defendant's punishment classification/range does not change regardless whether he is convicted of intentional aggravated assault, knowing aggravated assault or reckless aggravated assault. **Tex. Penal Code §22.02(b)(2)(B)**.

The trial court's inclusion of the reckless culpable mental state in its application paragraph stems from two seemingly contradictory holdings by this Court regarding the application of the reckless culpable mental state when the indictment fails to allege that culpable mental state:

	<i>Reed v. State</i>	<i>Hicks v. State</i>
Indictment	Intentional and knowing culpable mental states alleged. Reckless culpable mental state not alleged	Intentional and knowing culpable mental states alleged. Reckless culpable mental state not alleged
Application of Culpable Mental States	Jury instructed on intentional, knowing and reckless culpable mental states in single application paragraph	Jury instructed on intentional and knowing culpable mental states in application paragraph. Jury instructed on reckless culpable mental state in lesser-included offense instruction
Outcome	By alleging reckless in single application paragraph, charge improperly broadens indictment to allow conviction under an unalleged theory <b>Error</b>	Alleging reckless in separate instruction proper even though intentional/knowing aggravated assault and reckless aggravated assault have same punishment classification/range <b>Not Error</b>

See [\*Hicks v. State\*, 372 S.W.3d 649, 655-58 \(Tex. Crim. App. 2012\)](#); [\*Reed v. State\*, 117 S.W.3d 260, 261-65 \(Tex. Crim. App. 2003\)](#). Reading *Hicks* and *Reed* in conjunction, when an aggravated assault indictment alleges only the intentional and knowing culpable mental states, the trial court may not include the reckless culpable mental state in its main application paragraph, but may apply it through a lesser-included offense instruction. See [\*Hicks v. State\*, 372 S.W.3d at 657-68](#); [\*Reed v.\*](#)

*State*, 117 S.W.3d at 265. In other words, error does not occur because the trial court instructs on an unalleged reckless culpable mental state, but occurs when the trial court uses the wrong format – main application paragraph versus separate lesser offense instruction; an error having no practical consequence on whether the jury had a legitimate culpable mental state for conviction or on the defendant’s potential punishment range.

What harm – actual versus theoretical – does a defendant suffer when the error is a matter of form rather than substance. The dictionary provides the most straightforward differentiation between these common terms:

Actual = Existing and not merely potential or possible, or real.

Theoretical = Hypothetical, abstract or speculative.

See <https://www.merriam-webster.com/dictionary/actual>; <https://www.merriam-webster.com/dictionary/theoretical>.<sup>4</sup> In other words, is the effect real or merely hypothetical.

As previously stated, the trial court could have properly submitted this same reckless culpable mental state as a lesser-included offense of reckless aggravated assault without triggering an improper indictment expansion complaint yet with the same punishment consequences. See *Hicks v. State*, 372 S.W.3d at 657-58

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4 Going to the basic dictionary definition is akin to the eighth-grade grammar test often employed by this Court in analyzing statutes. See *O’Brien v. State*, 544 S.W.3d 376, 386 (Tex. Crim. App. 2018); *Jefferson v. State*, 189 S.W.3d 305, 315 (Tex. Crim. App. 2006) (Cochran, J., concurring).

(reckless aggravated assault is a lesser of intentional or knowing aggravated assault, and may be submitted even though indictment did not allege reckless culpable mental state); *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008) (intentional, knowing and reckless aggravated assault are “conceptually equivalent” because all three culpable mental states are strung together in a single phrase within a single subsection of the statute). In other words, just by the trial court re-configuring its charge, the jury could have properly considered the same reckless culpable mental state and reached the same punishment; thus, any effects from the trial court including the reckless culpable mental state in its main application paragraph are only hypothetical or abstract.

Likewise, if the reckless culpable mental state could have been presented to the jury and the error arises from its placement within the jury charge, it seems illogical that its inclusion in the main application paragraph rather than a separate instruction deprived the appellant of a fair trial or any vital defensive right.<sup>5</sup>

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5 A criminal defendant is entitled to fair notice of the specific charged offense. *Crenshaw v. State*, 378 S.W.3d 460, 465 (Tex. Crim. App. 2012); U.S. Const. amend. VI; Tex. Const. art. I § 10. Unlike in *Reed*, the appellant was provided fair notice because his indictment alleges the specific acts relied upon to constitute his reckless conduct. See *Reed v. State*, 117 S.W.3d at 265 (recklessness may not be included in the jury charge where specific acts constituting recklessness are not alleged in the indictment). Thus, the appellant cannot claim that he lacked notice of the specific acts supporting a reckless aggravated assault charge.

## CONCLUSION

This Court should vacate the court of appeals' decision that the appellant suffered egregious harm from the trial court applying an unalleged reckless culpable mental state in its main application paragraph when the court could have properly applied that same reckless culpable mental state as a lesser-included offense with the same punishment consequences. A defendant should not be deemed to suffer egregious or even "actual harm" to deprive him of a fair and impartial trial when the charge error has no practical consequences.

## PRAYER

The State prays that this Court reverse and vacate the decision of the court of appeals, and affirm the appellant's conviction for aggravated assault against a public servant.

Respectfully submitted,

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The State's brief on the merits of its petition for discretionary review was electronically served on opposing counsel, Mr. Robert K. Gill, 201 Main Street, Suite 801, Fort Worth, Texas 76102 ([bob@gillbrissette.com](mailto:bob@gillbrissette.com)), and on the State Prosecuting Attorney, Ms. Stacey Soule, P.O. Box 13046, Capitol Station, Austin, Texas 78711-3046 ([Stacey.Soule@SPA.texas.gov](mailto:Stacey.Soule@SPA.texas.gov)), on September 19, 2019.

/s/ Steven W. Conder  
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### CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word count requirements of Tex. R. App. P. 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains approximately 1737 words,



excluding those parts specifically exempted, as computed by Microsoft Office Word  
2013 - the computer program used to prepare the document.

/s/ Steven W. Conder  
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